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11 GROUPME, INC.

12   **UNITED STATES DISTRICT COURT**

13   **NORTHERN DISTRICT OF CALIFORNIA**

14   **OAKLAND DIVISION**

15 BRIAN GLAUSER, individually and on behalf   No. 4:11-cv-02584-PJH
    of a class of similarly situated individuals,
16
                                                     DEFENDANT GROUPME, INC.'S:
               Plaintiffs,
17
                                                     (1) REPLY BRIEF IN SUPPORT OF
            v.   **MOTION FOR SUMMARY**
18   **JUDGMENT;**
    TWILIO, INC., a Delaware corporation; and
19 GROUPME, INC., a Delaware corporation,   **(2) SUPPLEMENTAL DECLARATION**
                                                     OF JOHN PIGNATA; AND
20   Defendants.
                                                     (3) DECLARATION OF J. JONATHAN
21   **HAWK**

22

23   Date: November 5, 2014
                                                      Time: 9:00 a.m.
24   Courtroom: 3

25

26

27

28

GROUPME'S REPLY BRIEF IN SUPPORT OF MOTION
                                                     FOR SUMMARY JUDGMENT; 4:11-CV-02584-PJH

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TABLE OF AUTHORITIES; 4:11-CV-02584-PJH

1   I.   **INTRODUCTION**

2   Defendant GroupMe, Inc. ("GroupMe") provides a free social messaging service Brian

3   Glauser ("Plaintiff") used on April 23, 2011, to communicate among friends and arrange times to

4   play poker. Plaintiff never asked to be removed from that "Poker" group and even registered with

5   GroupMe on June 23, 2011, to create and send his own messages using its service. Yet, on May

6   27, 2011, he sued GroupMe alleging it violated the Telephone Consumer Protection Act ("TCPA")

7   by sending him a text message welcoming him to the "Poker" group.

8   GroupMe's summary judgment motion ("MSJ") and its uncontroverted evidence negate an

9   essential element of Plaintiff's claim. They show GroupMe, using its technology and technology

10   from non-party Twilio, Inc. ("Twilio"),[1] never sent Plaintiff text messages using an "automatic

11   telephone dialing system" ("autodialer"). Their respective technologies lacked functionalities the

12   TCPA and the Federal Communications Commission ("FCC") find necessary for equipment to

13   constitute an autodialer. Specifically, the TCPA and the FCC define "autodialer" as "equipment

14   which has the capacity to -- (A) store or produce telephone numbers to be called, using a random

15   or sequential number generator." (Emphasis added.)

16   GroupMe's uncontroverted evidence shows it and Twilio: (1) have never been able to

17   generate random or sequential phone numbers; and (2) have never been able to route text messages

18   without a group member first taking a specified action -- adding a new member to a group or

19   sending a social message. Group members provide GroupMe with the numbers to which messages

20   are routed, and members necessarily trigger the routing of all messages within a group.

21   Plaintiff spends most of his opposition to the MSJ arguing for an overbroad definition of

22   "autodialer" that is against the weight of the most recent case law and FCC authority. Plaintiff

23   also fails to carry his burden under Federal Rule of Civil Procedure ("Rule") 56 to produce

24   evidence creating a genuine issue of material fact under any definition of the term "autodialer."

25   First, Plaintiff argues GroupMe and Twilio's technologies are autodialers because,

26

27   _____

     [1] Plaintiff has apparently narrowed his claim to text messages received on or before June 20,
     2011. Opp. at 2. During that time period, GroupMe used only its and Twilio's technology to
28   route text messages to Plaintiff. *See* Pignata Decl., ¶ 5.

                                              1

1   hypothetically, they could be reprogrammed to generate phone numbers, *i.e.*, they have "potential"

2   capacity to autodial. Within the past thirteen months, four district courts from the Ninth, Third,

3   and Eleventh Circuits have considered and rejected this definition of "capacity" as overbroad and

4   inconsistent with the language of the TCPA. Only one district court cited by Plaintiff ruled

5   favorably regarding his argument, but that court misread the same Ninth Circuit opinions also

6   considered by the four district courts that rejected Plaintiff's argument.

7   Second, Plaintiff argues GroupMe and Twilio's technologies are "predictive dialers" and

8   constitute autodialers even without the ability to generate phone numbers. Plaintiff, however, has

9   never pleaded GroupMe used a predictive dialer and cannot now take that position. Moreover, the

10   most recent district court opinion to consider Plaintiff's interpretation of a "predictive dialer"

11   noted, less than three months ago, Plaintiff's argument rests on an "incomplete" reading of a key

12   FCC ruling from November 2012, and GroupMe's interpretation, requiring all autodialers be able

13   to generate random or sequential numbers, is consistent with that ruling. Only one of Plaintiff's

14   authorities even considered the 2012 FCC ruling, but that district court did not rely on it and

15   provides no support for Plaintiff. Finally, the FCC's rulings on predictive dialers make clear they

16   apply only to voice calls and should not be extended to the text messaging technology here.

17   Third, Plaintiff argues GroupMe's process of routing text messages to Plaintiff was entirely

18   automated. Yet, Plaintiff and his "expert," an employee of Plaintiff's counsel, admittedly

19   disregard all evidence showing GroupMe and Twilio can only route text messages in direct

20   response to a GroupMe user's actions. Plaintiff's "expert" never reviewed GroupMe's MSJ or

21   declarations, and, instead, focused entirely on how GroupMe and Twilio deliver and receive

22   messages <u>after</u> a group user initiates sending a text message. This is not the proper focus because

23   it purposely ignores the human intervention that causes the text message to be sent.

24   Finally, Plaintiff argues text messages he received from GroupMe constitute an "artificial

25   or prerecorded voice." However, Plaintiff admitted in response to a request for admission that

26   GroupMe never used an artificial or prerecorded voice to contact him, and he never pleaded such a

27   claim. Hawk Decl., ¶¶ 2-3, Ex. D; Am. Compl., Dkt. No. 34 at ¶ 55 (Sept. 15, 2011). Plaintiff's

28   interpretation of "voice" to include "written words" also has no support in fact or law.

<div align="center">2</div>

1   GroupMe's uncontroverted evidence shows it does not use, and never has used, an

2   autodialer. For the reasons shown in the MSJ and herein, GroupMe respectfully requests the Court

3   grant the MSJ because it did not use an autodialer.

4   **II.   FACTUAL BACKGROUND**

5   GroupMe is a free social messaging service used by a wide range of real-life networks to

6   communicate, including cancer support groups, neighborhood watch groups, families, and

7   emergency medical services. MSJ at 3-4 (citing Martocci Decl., ¶¶ 3-8). The most common group

8   names on the service have been "Mom" and "Dad." *Id.*

9   GroupMe is not, as Plaintiff mischaracterizes it, a "telemarketer," and GroupMe does not,

10   as Plaintiff incorrectly implies, make "intrusive telemarketing calls." Opp. at 5, 7. In fact, earlier

11   this year, the FCC considered GroupMe's service and stated GroupMe is a "text-based social

12   network," and its administrative, non-telemarketing text messages are "expected and desired" by

13   consenting users. *In re Rules and Regulations Implementing the Telephone Consumer Protection*

14   *Act of 1991*, Declaratory Ruling, FCC 14-33 ¶¶ 4, 7, 8 (Mar. 27, 2014). Plaintiff's attempt to

15   portray GroupMe as a telemarketer is a ruse.

16   On April 18, 2011, Mike L. created a group using GroupMe's service. MSJ at 7-8 (citing

17   Martocci Decl., ¶¶ 17, 20-22, 30-31; Pignata Decl. ¶¶ 3-7). On April 23, 2011, Mike L. provided

18   GroupMe with Plaintiff's name and phone number, and instructed GroupMe to add Plaintiff to the

19   "Poker" group, then consisting of eight people. *Id.* By adding Plaintiff to the group, Mike L.

20   triggered GroupMe's software to send Plaintiff a customized message welcoming him to the

21   group and notifying him about how to avoid potential data charges by downloading the GroupMe

22   smartphone app, exit the group, and avoid future group messages. *Id.* The "welcome" message

23   exceeded the 160-character limit imposed by SMS, so it was broken into two messages:

24   Hi Brian Glauser, it's Mike [L]. Welcome to GroupMe! I just added
         you to "Poker" w/ Richard [L]. Text back to join the conversation.

25   GroupMe is a group texting service. Standard SMS rates may
26   apply. Get the app at http://groupme.com/a to chat for free. Reply
         #exit to quit or #help for more.

27   Martocci Decl., ¶ 31, Dkt. No. 107-2 (Apr. 29, 2014).

28   Plaintiff then received social messages from other group members and Plaintiff responded

3

1   "In" to the group on April 23, 2011. MSJ at 8 (citing Martocci Decl., ¶ 31; Pignata Decl. ¶¶ 3-7).

2   After he filed this action on May 27, 2011, Plaintiff registered with GroupMe to use its service on

3   June 23, 2011, and, today, he remains a "Poker" group member. *Id.*

4   GroupMe's evidence shows GroupMe and Twilio routed text messages to Plaintiff as part

5   of the "Poker" group. MSJ at 4-8. However, GroupMe and Twilio's software applications have

6   only been capable of routing messages immediately after and in direct response to actions by group

7   members, specifically, adding new members to a group or initiating their own text messages. *Id.*

8   (citing Martocci Decl., ¶¶ 9-29; Pignata Decl., ¶¶ 3-7; Badri Decl., ¶¶ 5-9). GroupMe and Twilio

9   have never been able to generate or dial random or sequential numbers. *Id.* They have never been

10   able to engage in random messaging. *Id.* In fact, the customized "welcome" message is sent to

11   one person at a time as a group creator adds members to a group. Because GroupMe limited the

12   size of groups to 25 members during the proposed class period, there were no "blast" messages as

13   messages can only be sent to the 25 or fewer members within a particular group. *Id.*

14   Plaintiff's evidence does not address any of these facts. Rather, it consists of a declaration

15   from Shawn C. Davis, a full-time employee of Plaintiff's counsel, whose job is to analyze

16   technologies for Plaintiff's counsel looking for data breaches and privacy violations, often before

17   they file a lawsuit. Davis Decl., Dkt. No. 131-1 at ¶ 1; Hawk Decl., ¶ 4.a-c, Ex. E. Until this case,

18   Mr. Davis had no experience with GroupMe's programming language (Ruby) or web

19   programming framework (Ruby on Rails) about which he purports to offer an "expert" opinion.

20   Davis Decl., ¶¶ 7, 13, 16, 21, 23, 25, 28, 32; Hawk Decl., ¶ 4.d, Ex. E.

21   Mr. Davis failed to review GroupMe's MSJ or supporting declarations. Hawk Decl., ¶

22   4.e-h, Ex. E. He testified he cannot dispute evidence showing GroupMe and Twilio have only

23   been able to route text messages in direct response to user action. *Id.* Rather, Mr. Davis formed

24   his opinions based solely on how GroupMe and Twilio deliver and receive messages <u>after</u> a group

25   user adds a new member or initiates his or her own text message to other group members. *Id.*

26   GroupMe's uncontroverted evidence shows GroupMe and Twilio have never been able to

27   generate phone numbers. That evidence shows GroupMe and Twilio have only been capable of

28   routing text messages immediately after and in direct response to a group member's action.

4

1   III.   **ARGUMENT**

2   The three elements of Plaintiff's TCPA claim are: (1) a defendant called a cell phone; (2)

3   using an autodialer; (3) without "prior express consent" from the called party. *Gragg v. Orange*

4   *Cab Co.*, 995 F. Supp. 2d, 1189, 1192 (W.D. Wash. 2014) (citing *Meyer v. Portfolio Recovery*

5   *Assoc., LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012)). Plaintiff has the burden of persuasion at trial

6   on each of these elements, including that GroupMe sent him text messages using an autodialer.

7   *Id.*; *Buslepp v. Miami Improv, Inc.*, 2012 WL 4932692, at *2 (S.D. Fla. Oct. 16, 2012).

8   In support of its MSJ, GroupMe produced evidence showing it did <u>not</u> use an autodialer to

9   send Plaintiff text messages. MSJ at 4-8. To survive summary judgment under Rule 56, Plaintiff

10   had, but failed to carry, the burden to produce evidence supporting the autodialer element of his

11   TCPA claim. *Buslepp*, 2012 WL 4932692, at *2. Summary judgment is appropriate.

12   A.   **GroupMe Has Not Used an Autodialer**

13   The TCPA and FCC's implementing regulations define "autodialer" as "equipment which

14   has the capacity -- (A) to store or produce numbers to be called, <u>using a random or sequential</u>

15   <u>number generator</u>. . . ." MSJ at 10-13 (citing 47 U.S.C. § 227(a)(1); 47 C.F.R. § 64.1200(f)(2)

16   (emphasis added)). Citing three opinions issued within the last thirteen months from district courts

17   in the Ninth, Third and Eleventh Circuits, GroupMe's MSJ shows, to constitute a "random or

18   sequential number generator" under the TCPA, equipment must be able to autonomously generate

19   "random sequences of [ten] digit" phone numbers or autonomously generate sequential sets of ten-

20   digit phone numbers, *e.g.*, "(111) 111-1111, (111) 111-1112, and so on." MSJ at 11 (citing *Gragg*,

21   995 F. Supp. 2d at 1193; *Dominguez v. Yahoo!, Inc.*, 2014 WL 1096051, at *5-6 (E.D. Pa. Mar. 20,

22   2014); *Hunt v. 21st Mort. Corp.*, 2013 WL 5230061, at *3-4 (N.D. Ala. Sept. 17, 2013)).

23   GroupMe's evidence in support of its MSJ negated any possibility of its or Twilio's

24   technologies ever being able to perform these functions. That evidence shows the technologies

25   used to route messages to Plaintiff never have been able to generate random or sequential phone

26   numbers. MSJ at 6-8 (citing Martocci Decl, ¶¶ 24-29; Pignata Decl., ¶ 3; Badri Decl., ¶ 8). Group

27   members provide GroupMe with phone numbers, just as Mike L., the "Poker" group creator,

28   provided GroupMe with Plaintiff's number when he added Plaintiff to the "Poker" group. *Id.*

1   Plaintiff does not dispute these facts. Rather, Plaintiff seeks to avoid summary judgment

2   by arguing for an overbroad interpretation of "autodialer." Opp. at 6-16. Plaintiff argues

3   GroupMe and Twilio's technologies are autodialers because they: (1) are software applications that

4   could hypothetically be reprogrammed to generate phone numbers, *i.e.*, they have "potential"

5   capacity; and (2) are "predictive dialers" that route text messages without human intervention,

6   which, according to Plaintiff, constitute autodialers even without the ability to generate phone

7   numbers. *Id.* Plaintiff's legal interpretation of "autodialer" is incorrect.

8   **1.   Equipment Must Have the Present Capacity at the Time of Use to**

9   **Generate Random or Sequential Phone Numbers to be an Autodialer**

10   GroupMe's MSJ, citing *Gragg*, *Dominguez*, and *Hunt*, shows the majority of courts to

11   consider this issue have held equipment is an autodialer only if, <u>at the time of use</u>, it can generate

12   phone numbers -- the equipment has "present" capacity. MSJ at 11-13 (citing *Gragg*, 995 F. Supp.

13   2d at 1193; *Dominguez*, 2014 WL 1096051, at *5-6; *Hunt*, 2013 WL 5230061, at *3-4). Congress

14   wrote the TCPA in the "present tense," defining an autodialer as equipment which "<u>has</u> the

15   capacity" to perform specified functions. *Id.*

16   The *Gragg* and *Hunt* courts rejected the same misinterpretation of "capacity" Plaintiff

17   advocates here -- equipment is an autodialer if it could be reprogrammed to generate phone

18   numbers. MSJ at 13 n.4 (citing *Gragg*, 995 F. Supp. 2d at 1196, and *Hunt*, 2013 WL 5230061, at

19   *4). The *Gragg* and *Hunt* courts reasoned that focusing on technology's "<u>potential</u> capacity to

20   store or produce and call telephone numbers using a random or sequential number generator"

21   would unacceptably "capture many of contemporary society's most common technological devices

22   within the statutory definition [of an autodialer]." *Id.* (emphasis in original).

23   Less than four months ago, after GroupMe filed its MSJ, yet another district court in the

24   Eleventh Circuit reached the same conclusion. *De Los Santos v. Millward Brown, Inc.*, 2014 WL

25   2938605, at *6 (S.D. Fla. June 30, 2014). The *De Los Santos* court, agreeing with *Gragg*, *Hunt*,

26   and *Dominguez*, reasoned that focusing on equipment's potential capacity to be reprogrammed,

27   would provide "no 'outer limit'" on the term "autodialer" because "virtually every telephone in

28   existence given a team of sophisticated engineers working doggedly to modify it, could possibly

6

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1 store or produce numbers using a random or sequential number generator," and could also subject

2 the TCPA to a First Amendment challenge on the ground it is unconstitutionally overbroad. *Id.*

3   Plaintiff disregards these opinions and asks the Court to determine equipment is an

4 autodialer if it has the theoretical or "potential" capacity to be modified to generate random or

5 sequential phone numbers, arguing incorrectly that two Ninth Circuit opinions -- *Satterfield* and

6 *Meyer* -- support his position. Opp. at 16-17. Plaintiff misreads them, as neither opinion ruled on

7 this issue. *Satterfield* considered evidence regarding a piece of equipment's actual capacity at the

8 time of use. *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009). In *Meyer*,

9 defendant made GroupMe's "present" capacity argument, but the court never ruled on it because

10 there was no dispute the equipment "ha[d] the capacity described in the TCPA." 707 F.3d at 1043.

11   Further, *Gragg*, *Dominguez*, and *Hunt* all cited *Satterfield* and/or *Meyer* on the "capacity"

12 issue, and still rejected Plaintiff's "potential" capacity argument. *Gragg*, 995 F. Supp. 2d at 1195

13 (*Satterfield* "does not justify the later judicial gloss on which plaintiff relies"); *Dominguez*, 2014

14 WL 1096051, at *5 n.6 (citing *Satterfield*); *Hunt*, 2013 WL 5230061, at *3 (citing *Satterfield* and

15 *Meyer*).[2] *Satterfield* and *Meyer* provide no support for Plaintiff.

16   Plaintiff's only other authority on this is an outlier opinion from the Southern District of

17 California. Opp. at 17 (citing *Sherman v. Yahoo!, Inc.*, 997 F. Supp. 2d 1129 (S.D. Cal. 2014)).

18 *Dominguez* considered the same service offered by the same defendant (Yahoo!) as *Sherman*, and

19 ruled the other way. *Dominguez*, 2014 WL 1096051, at *5-6. *Gragg*, on a motion for

20 reconsideration, also directly addressed and rejected the reasoning applied in *Sherman*. *Gragg*,

21 995 F. Supp. 2d at 1195-96. *Sherman* is a minority of one, even within its own district. *See, e.g.,*

22 *Ibey v. Taco Bell Corp.*, 2012 U.S. Dist. LEXIS 91030, at *9 (S.D. Cal. June 18, 2012) (autodialer

23 must "use a random or sequential number generator to text the numbers").

24   The weight of authority holds, to constitute an autodialer, equipment must have the

25 present capacity at the time of use to generate random or sequential phone numbers. This is the

26 better reasoned position. It comports with the language of the TCPA and provides a constitutional

27 _____

28 [2] At least one other court ruled *Satterfield* did <u>not</u> resolve Plaintiff's "potential" capacity argument. *Lee v. LoanDepot.com, LLC*, No. 6:14-cv-1084, Order, Dkt. No. 14 at 3 (D. Kan. Aug. 20, 2014).

1   limit on what constitutes an autodialer in light of today's technology. Here, the Court should adopt

2   the "present" capacity definition from *Gragg, Dominguez, Hunt,* and *De Los Santos.*

3   **2.   GroupMe Has Not Used a Predictive Dialer**

4   Separate from his "potential" capacity argument, Plaintiff argues the FCC has ruled

5   "predictive dialers" constitute "autodialers," even if predictive dialers cannot generate random or

6   sequential phone numbers. Opp. at 6-16. Plaintiff argues he can establish his autodialer theory by

7   showing GroupMe and Twilio merely "dial[] from a list of [stored] numbers without human

8   intervention." Opp. at 14. Plaintiff misreads the FCC's regulations, and his authorities ignore a

9   key FCC ruling from 2012 that clarifies all autodialers must be able to generate phone numbers.

10   a.   <u>All Autodialers Must Be Able to Generate Phone Numbers</u>

11   The plain text of the TCPA and the FCC's implementing regulations have always defined

12 an autodialer as a "random or sequential number generator." 47 U.S.C. § 227(a)(1); 47 C.F.R. §

13 64.1200(f)(2). These authorities have never defined autodialer relying solely on a piece of

14 equipment's ability to dial phone numbers from a list without human intervention. *Id.*

15   The FCC confirmed this on November 29, 2012, stating:

16   [u]nder the TCPA, the term 'automatic telephone dialing system' or
          'autodialer' is defined as 'equipment which has the capacity to –

17   (A) store or produce telephone numbers to be called, using a
          random or sequential number generator. . . . The Commission has

18   emphasized that this definition covers any equipment that <u>has</u> the
          specified <u>capacity to generate</u> and dial them without human

19   intervention regardless of whether the numbers called are randomly
          or sequentially generated or come from calling lists. . . .

20

21 *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,*

22 Declaratory Ruling, 27 FCC Rcd 15391, 15391 ¶ 2 n.5 (Nov. 29, 2012) ("2012 FCC Ruling")

23 (emphasis added). The 2012 FCC Ruling, in no uncertain terms, supports GroupMe's position.

24 An autodialer must have "the specified <u>capacity to generate numbers</u> and dial . . . regardless of

25 whether the numbers . . . come from calling lists. . . ." *Id.* (emphasis added).

26   Plaintiff's argument to the contrary stems from misreading the plain language of the 2012

27 FCC Ruling and FCC rulings from 2003 and 2008. Opp. at 8 (citing *In re Rules and Regulations*

28 *Implementing the Telephone Consumer Protection Act of 1991,* Report and Order, 18 FCC Rcd

                                        8

1   14014 (July 3, 2003) ("2003 Report and Order"), and *In re Rules and Regulations Implementing*

2   *the Telephone Consumer Protection Act of 1991*, Decl. Ruling, 23 FCC Rcd 559 (Jan. 4, 2008)).

3   The FCC's 2003 and 2008 rulings did not eliminate the requirement that an autodialer "us[e] a

4   random or sequential number generator;" they merely clarified certain equipment could be an

5   autodialer if it had the capacity (used or unused) to generate phone numbers it dialed. *Id.*

6   The district court that most recently considered Plaintiff's "predictive dialer" argument in

7   light of the 2012 FCC Ruling agreed with GroupMe's interpretation of FCC authority. In *Sterk v.*

8   *Path, Inc.*, 2014 WL 2443785, at *2-4 (N.D. Ill. May 30, 2014),[3] Plaintiff's attorneys, Edelson PC,

9   made the same argument they make here -- predictive dialers do not need to be able to generate

10   random or sequential numbers to constitute autodialers. The *Sterk* court initially agreed. *Id.* Upon

11   reassignment, however, a new judge certified the issue for interlocutory appeal to the Seventh

12   Circuit. *Sterk v. Path, Inc.*, No. 1:13-cv-02330, Order, Dkt. No. 143 at 3 (N.D. Ill. Aug. 8, 2014).

13   The new judge reviewed the same interpretation of "predictive dialer" Plaintiff requests here and

14   noted such a reading of the 2012 FCC Ruling "is incomplete:"

15   [i]n Sterk's view, the FCC's language -- dialing stored numbers
              without human intervention -- is all that is required for a system to
              fall under the TCPA. . . . But plaintiff's argument about the FCC's

16   decision is incomplete. In describing the dialing-without-human-
              intervention concept, the FCC has 'emphasized that [the statutory]

17   definition covers any equipment that has the specified <u>capacity to
              generate numbers and</u> dial them without human intervention. . . ."

18

19   *Id.* (emphasis in original). The court went on to note GroupMe's position -- all autodialers must

20   be able to generate numbers -- "is consistent with the FCC's 2012 [Ruling]." *Id.*

21   Plaintiff also argues incorrectly that case law supports his argument. Opp. at 9-11. Yet, as

22   Plaintiff admits, FCC authority binds district courts, *id.*, and only one of Plaintiff's authorities

23   considered the 2012 FCC Ruling. That case is inapposite. *Sherman* cited the 2012 FCC Ruling

24   (believing incorrectly it was from 2003), but "did not rest its holding on" whether Yahoo! used a

25   predictive dialer. The *Sherman* court denied Yahoo!'s summary judgment motion based on its

26   adoption of the "potential" capacity theory discussed above. *Sherman*, 997 F. Supp. 2d at 1141.

27   ³ Plaintiff appears to have abandoned his previous reliance on the *Sterk* court's order granting
     summary judgment. *See* Dkt. No. 112 at 8, 9, 10 n.9. Regardless, GroupMe distinguished that

28   ruling in its opposition to Plaintiff's Rule 56(d) motion. *See* Dkt. No. 113 at 23-25.

                                            9

1   None of Plaintiff's remaining authorities considered the 2012 FCC Ruling. *Satterfield* and

2 *Meyer* did not consider it. *Satterfield*, 569 F.3d at 948 (decided in 2009); *Meyer*, 707 F.3d at

3 1040 (initially decided in October 2012, and amended on an unrelated issue in December 2012).

4 The rest of Plaintiff's district court authorities likewise did not consider the 2012 FCC Ruling

5 and, instead, relied on the FCC's 2003 and 2008 rulings, *Satterfield*, and/or *Meyer*.[4]

6 Consideration of the 2012 FCC Ruling in those cases would have resulted in a different outcome.

7   Finally, Plaintiff's statutory interpretation argument must fail. Plaintiff argues the term ".

8 . . , using a random or sequential number generator" "modifies only the term 'produce'" that

9 immediately precedes it. Opp. at 12. Yet, basic rules of statutory interpretation dictate the term

10 ". . ., using a random or sequential number generator" modifies the "entire series" of items

11 preceding the comma -- "to store or produce telephone numbers to be called." 47 U.S.C. §

12 227(a)(1); *see generally Am. Int'l. Grp., Inc. v. Bank of Am.*, 712 F.3d 775, 781-82 (2d Cir. 2013).

13   This Court should follow the FCC rulings. Reading all of the authorities together shows

14 GroupMe is entitled to summary judgment, as GroupMe and Twilio's technologies cannot, and

15 never have been able to, generate random or sequential numbers.

16   b. Predictive Dialer Regulations Do Not Apply to Text Messages

17   Even assuming *arguendo* a predictive dialer without the ability to generate phone numbers

18 can be an autodialer (which it cannot), GroupMe's MSJ shows the FCC's predictive dialer rulings

19 apply only to voice calls. MSJ at 16-17 (citations omitted). A predictive dialer is "equipment that

20 dials numbers and, when certain computer software is attached, also assists telemarketers in

21 predicting when a sales agent will be available to take calls." 2003 Report and Order, ¶ 131.

22   Consistent with the FCC's definition of predictive dialer, the FCC's rulings on this issue

23 focus solely on equipment used in connection with "sales agents" making voice calls to consumers

24 using equipment with "a timing function" to "predict" when a consumer will answer the phone so

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25 [4] *Fields v. Mobile Msgrs. of Am., Inc.*, 2013 WL 6774076, at *3 (N.D. Cal. Dec. 23, 2013);
26 *Hernandez v. Collection Bureau of Am., Ltd.*, 2014 U.S. Dist. LEXIS 140661, at *2-9 (C.D. Cal. Apr. 16, 2014); *Bates v. Dollar Loan Ctr., LLC*, 2014 WL 3516260, at *2 (D. Nev. July 15, 2014);
27 *Davis v. Diversified Consultants, Inc.*, 2014 WL 2944864, at *6 (D. Mass. June 27, 2014); *see also Griffith v. Consumer Portfolio Srvcs., Inc.*, 838 F. Supp. 2d 723, 727 (N.D. Ill. 2011); *Hickey v.*
28 *VoxerNet, LLC*, 887 F. Supp. 2d 1125, 1129-30 (W.D. Wash. 2012).

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1   a "telemarketer will be available to take the call." *Id.* These rulings do not mention text messages.

2   *Id.* The factual scenarios in these rulings are inapplicable to text messaging technologies because,

3   like GroupMe and Twilio, they do <u>not</u> involve sales agents making voice calls at varying intervals

4   determined by an algorithmic timing function designed to ensure a live person is available to speak

5   to a called party. The FCC's predictive dialer rulings do not cover text messaging technologies

6   and do not bind the Court here. *See Leyse v. Clear Channel Broad., Inc.,* 545 Fed. Appx. 444,

7   448-51 (6th Cir. 2013) (courts can determine scope of FCC ruling without violating Hobbs Act).

8   FCC rulings on predictive dialers should also <u>not</u> apply here by extension. The policy

9   concerns underlying FCC regulation of predictive dialers are not present with text messages. The

10   FCC regulated predictive dialers because consumers complained predictive dialers made calls

11   while sales agents were busy speaking with other customers and unavailable, thereby resulting in

12   consumers answering phones and hearing "dead air" while they waited for a salesperson or

13   disconnection. *In re Rules and Regulations Implementing the Telephone Consumer Protection Act*

14   *of 1991*, Notice of Proposed Rulemaking, 17 FCC Rcd 17459, 17465, -69, -75 at ¶¶ 7, 15, 26 n.37

15   (Sept. 18, 2002) ("2002 NPRM"). These "abandoned calls" left consumers "feel[ing] harassed or

16   aggravated." 2003 Report and Order, ¶ 147.

17   Since 2002, within its TCPA regulations, the FCC has created a complex regulatory

18   scheme for predictive dialers, designed to protect consumers from "abandoned" and "dead air"

19   calls, and these regulations, by their terms, can be applied only to voice calls. 2002 NPRM, ¶¶ 15,

20   26; 2003 Report and Order, ¶¶ 131-133, 146-158; 47 C.F.R. § 64.1200(a)(7). The FCC's predictive

21   dialer rules regulate the frequency with which predictive dialers can acceptably "abandon calls,"

22   determine a call is "abandoned" if a salesperson does not engage the consumer within two seconds

23   of the consumer answering his/her phone, and require callers avoid "dead air" by playing a

24   prerecorded voice message for consumers if a salesperson is unavailable to take the call. *Id.*

25   Text messages do not involve "abandoned" calls, hang-ups, or dead air. The Court should

26   not extend the FCC's predictive dialer rulings beyond their policy and factual underpinnings.

27   GroupMe made this argument in opposition to Plaintiff's Rule 56(d) motion. *See* Dkt. No. 113 at

28   22-23. Plaintiff did not address it then, and the authorities he now cites are inapposite. Only

<div align="center">11</div>

1   *Satterfield*, *Fields* and *Hickey* address text messages allegedly sent by a "predictive dialer." Yet,

2   none of those cases addresses and rules on the 2012 FCC Ruling or arguments above regarding the

3   scope of the FCC's predictive dialer rulings. Moreover, *Hickey* is a ruling on a motion to dismiss,

4   *Hickey*, 887 F. Supp. 2d at 1129-30, and *Fields* relied on the holding in *Meyer*, 2013 WL 6774076,

5   at *3, which did not involve text messages and did not consider the arguments made here. The

6   FCC's predictive dialer rulings have no application here and should not be extended.

   B.   Human Intervention Is Required to Route Plaintiff Text Messages

8   Assuming *arguendo* Plaintiff's expansive definition of "predictive dialer" applies (which

9   it does not), Plaintiff has the burden to show GroupMe's technology: (1) stores phone numbers;

10   and (2) calls those numbers "automatically and without human intervention." *See Gragg*, 995 F.

11   Supp. 2d at 1193-95; Opp. at 15. Plaintiff, again, fails to carry his burden.

   1.   Plaintiff Does Not Plead GroupMe Used a Predictive Dialer

13   Plaintiff argues throughout his opposition that GroupMe sent him text messages using a

14   "predictive dialer," which, according to Plaintiff, does <u>not</u> need to have the capacity to generate

15   random or sequential phone numbers to constitute an autodialer. Opp. at 8-13. Yet, Plaintiff does

16   not plead GroupMe used such a variety of "autodialer." Plaintiff pleads only, in accordance with

17   the TCPA definition, GroupMe sent text messages "using a random or sequential number

18   generator." Am. Compl., ¶ 55; *see also Dominguez*, 2014 WL 1096051, at *5 n.6.

19   In order to argue he properly pleads his predictive dialer theory, Plaintiff makes an

20   argument entirely inconsistent with much of his opposition -- predictive dialers "fall within the

21   statutory definition of" autodialer. Opp. at 7 n.6, 10, 15 n.12. Plaintiff cannot have it both ways.

22   Either all autodialers have the capacity to generate numbers as the statutory definition requires, or

23   Plaintiff fails to plead the theory he now attempts to pursue. *See Asociacion de Trabajadores v.*

24   *City of Lake Forest*, 624 F.3d 1083, 1089 (9th Cir. 2010) (cannot oppose summary judgment by

25   raising an unpleaded theory). GroupMe is entitled to summary judgment under either scenario.

   2.   GroupMe/Twilio Require Human Intervention to Route Messages

27   GroupMe's evidence shows every text message sent across its service, without exception,

28   is sent immediately and in direct response to a GroupMe user instructing GroupMe to do

   12

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1   something. MSJ at 5, 17-18 (Martocci Decl., ¶¶ 9-29; Pignata Decl., ¶ 3; Badri Decl., ¶¶ 5-9);

2   Supp. Pignata Decl., ¶ 4. Without user action, messages never have been and cannot be routed. *Id.*

3   This same level of human intervention was sufficient to defeat an autodialer allegation in

4   *Gragg*, where the court noted "[t]he system is able to dial and transmit the [text message] only

5   after the driver has physically pressed 'accept," and deemed human intervention "essential."

6   *Gragg*, 995 F. Supp. 2d at 1194. The same cause-and-effect is present here. GroupMe and Twilio

7   route text messages only immediately after, and in direct response to, a user adding a group

8   member or initiating a text message. This manner of human intervention is consistent with the

9   legislative history of the TCPA. H.R. Rep. 101-633, Dkt. No. 25-3 at 3 (1990 WL 259268, at *2

10 (July 27, 1990)), judicially noticed at Order, Dkt. No. 73 at 5. Congress expressed concern that

11 automated equipment would "seize" a recipient's phone line and, without a live person to take the

12 call, not disconnect when the called party hung up. *Id.* Phone lines are not "seized" here.

13   Plaintiff produced absolutely no evidence challenging GroupMe's showings, and cited no

14 authority applying a different interpretation of human intervention. Still, Plaintiff argues

15 incorrectly and summarily GroupMe's "entire process was automated" and "no human activity

16 was actually involved (or necessary) to send the text messages at-issue." Opp. at 4, 16. Plaintiff

17 bases these arguments solely on Mr. Davis's opinions, which ignore key evidence and are wrong.

18   Mr. Davis ignored all evidence describing how a GroupMe user's actions cause GroupMe

19 and Twilio to route a text message. Hawk Decl., ¶ 4.e-g, Ex. E. Mr. Davis never reviewed

20 GroupMe's evidence in support of its MSJ, and admitted he has no basis to dispute that evidence:

21   Q: Sure. If somebody in this case has taken the opinion that these
               messages you've referred to as [']preprogrammed['] text
22   messages cannot be sent unless a user takes some action, do you
               have any basis to dispute that?
23   * * *

24   A: No. I don't think I could definitively dispute that, no.

25 *Id.* Mr. Davis bases his opinions only on how GroupMe and Twilio deliver and receive messages

26 <u>after</u> a GroupMe user adds a group member or initiates a message. *Id.* at ¶ 4.h. For example, as to

27 the "welcome" message, Mr. Davis admits it can be sent only if another user adds a new member:

28   Q: [']Without human intervention['] to you means that the user had
               to do absolutely nothing in order for that message to be sent out?

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> A: Well, I mean as you said, there's always going to be a start, where a user has to do something. <u>I mean, the user would have to add the person to the group</u> . . . but once everything is set up, then, yes, certain aspects of this are fully automated and don't require any human intervention.

4   Hawk Decl., ¶ 4.f (emphasis added); Supp. Pignata Decl., ¶¶ 3-4. Mr. Davis also admits the

5   welcome message Plaintiff received was <u>not</u> entirely "pre-programmed." Hawk Decl., ¶ 4.g.v.

6   Mr. Davis testified he believes GroupMe and Twilio "automatically dial[] phone numbers"

7   only because his analysis disregards the user action required to initiate the entire process. Hawk

8   Decl., ¶ 4.h. His analysis is akin to assessing the defendant's system in *Orange Cab* based only on

9   what happened after the taxi driver pressed "accept," and would, applied to more common

10   behaviors, mean all individual text messages sent using smartphones (not even using GroupMe)

11   are sent "without human intervention."[5] His analysis is wrong.

12   Plaintiff also fails to distinguish *Gragg* factually.[6] Plaintiff argues *Gragg* is inapposite

13   because, there, the text message was sent to the person who requested the taxi. Opp. at 15-16.

14   That argument goes, at most, to whether there was "prior express consent," which is a complete

15   defense to a TCPA claim, but is irrelevant to determining whether an autodialer was used.

16   GroupMe and Twilio cannot, and have never been able to, route text messages without

17   human intervention. GroupMe is entitled to summary judgment.

18   **C.   <u>GroupMe Did Not Use an Artificial or Prerecorded Voice to Contact Plaintiff</u>**

19   Plaintiff argues incorrectly, for the first time and without supporting authority, that text

20   messages he received as part of the "Poker" group constitute "artificial or prerecorded voice[s]"

21   under the TCPA. Opp. at 17-18. This argument fails for three reasons.

22   First, Plaintiff admitted, in response to a request for admission, GroupMe did <u>not</u> use an

23   artificial or prerecorded voice to contact him:

24   **REQUEST FOR ADMISSION NO. 5:** Admit GroupMe, Inc. never contacted you using an artificial or prerecorded voice.

25   _____

26   [5] Mr. Davis also testified he believes sending an SMS message from a smartphone without using GroupMe is an "automated" process, performed "without human intervention," as long as he focuses solely on what happens after a user presses "send." Hawk Decl., ¶ 4.i, Ex. E.

27   [6] Plaintiff argues *Gragg* held incorrectly equipment must be "either an [autodialer] or a predictive

28   dialer." Opp. at 14. This, addressed above, does not impact the "human intervention" analysis.

<center>14</center>

1   **ANSWER:** Plaintiff admits this Request.

2   Hawk Decl., ¶¶ 2-3, Ex. D. This is "conclusively established." *See* Fed. R. Civ. P. 36(b).

3   Second, Plaintiff does not plead GroupMe used an artificial or prerecorded voice to

4   contact him. The autodialer and "artificial or prerecorded voice" provisions create separate

5   TCPA violations. Plaintiff pleads only one of them -- GroupMe used a "random or sequential

6   number generator." Am. Compl., ¶ 55; *Iniguez v. The CBE Grp.*, No. 2:13-cv-00843, Order, Dkt.

7   No. 30 at 9 (E.D. Cal. Sept. 5, 2013). Plaintiff cannot pursue an unpleaded theory to avoid

8   summary judgment. *See Asociacion de Trabajadores*, 624 F.3d at 1089.

9   Third, Plaintiff argues the definition of "artificial or prerecorded voice" includes "written

10   words," and, thus, SMS. Opp. at 18 (emphasis added). Plaintiff's proposed definition disregards

11   common definitions of "voice" and legislative history,[7] and, instead, relies on an inapposite

12   dictionary definition that applies only to idioms. *See* http://dictionary.reference.com/browse/voice

13   (providing example of "giv[ing] voice to one's disapproval by a letter") (Oct. 14, 2014); Opp. at

14   18. The FCC has not adopted Plaintiff's misinterpretation of "voice," and, contrary to Plaintiff's

15   assertion, there is nothing to be gleaned from a statement in the 2003 Report and Order on an

16   unrelated issue. Opp. at 18. The FCC's 2012 Report and Order states the TCPA applies to

17   "telephone calls using an [autodialer] or a prerecorded voice." 2012 Report and Order, ¶ 20.

18   Plaintiff cannot avoid summary judgment by arguing GroupMe used an artificial or prerecorded

19   voice to contact him (because it did not).

20   **IV.   CONCLUSION**

21   For the reasons above and in GroupMe's MSJ, GroupMe respectfully requests the Court

22   grant its MSJ and enter judgment in its favor.

23   Dated: October 20, 2014   WHITE & CASE LLP

24   By:____/s/ *Bryan A. Merryman*____
                                                              Bryan A. Merryman

25
                                                     Attorneys for Defendant
26   GROUPME, INC.

27   _____
      [7] Congr. Rec. – Sen., Dkt. No. 25-2 at 3 (1991 WL 250460 (Nov. 26, 1991) (Congressional
28   concern with "tape-recorded voice[s]"), judicially noticed at Order, Dkt. No. 73 at 5.

                                                    15